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No. 80-597

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARTIN PAINTING AND COATING COMPANY,
PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether there was substantial evidence establishing that petitioner committed a serious violation of a safety standard, promulgated under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, by failing to exercise reasonable diligence to prevent its employee's contact with an electric power circuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A9) is not reported. The opinion of the Occupational Safety and Health Review Commission (Pet. App. A10-A20) is reported at 1977-1978 Occup. Safety & Health Dec. ¶ 22,239. A summary of the opinion of the administrative law judge (Pet. App. A21-A27) is reported at 1976-1977 Occup. Safety & Health Dec. ¶ 20,808.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1980. The petition for a writ of certiorari was filed on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner has accurately reprinted the statutory and regulatory provisions involved in this case (Pet. 2-4), except that the scope of judicial review is not governed by the Administrative Procedure Act, 5 U.S.C. 706(2)(E). The correct provision (see Pet. App. A8) is 29 U.S.C. 660(a), which provides in pertinent part:

> * * * The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. * * *

STATEMENT

Petitioner is a painting contractor that was employed by Jeffrey Mining and Machinery Company to

paint a water tower at Jeffrey's worksite in Columbus, Ohio. One of petitioner's employees, Glenn Stonerock, was electrocuted on October 23, 1975, when he came in contact with high voltage lines terminating near the northeast leg of the tower (Pet. App. A11-A12). Based on an investigation by a compliance officer of the Occupational Safety and Health Administration, the Secretary of Labor cited petitioner for a serious violation (see 29 U.S.C. 666(j)) of an OSHA safety standard providing that "[n]o employer shall permit an employee to work in such proximity to * * * an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means * * *." 29 C.F.R. 1926.400 (c)(1).

It is undisputed that petitioner's management personnel were aware of the hazard. Petitioner's president had been informed by Jeffrey's superintendent that it would be necessary to deenergize the voltage lines before any work was performed around the northeast leg of the water tower (Pet. App. A12-A13). Petitioner's supervisor for the Jeffrey project stated that he had planned to take such action (*id.* at A13-A14, A23), but did not contact Jeffrey to make the necessary arrangements (*id.* at A13). Nor did he tell Stonerock or his co-worker of the plans, even though he visited the jobsite two days before the fatality (*id.* at A13-A14 & n.3). Although the supervisor pointed out the location of the high voltage lines to Stonerock and told him they were " 'like a red stick of dynamite' " (*id.* at A13), he did not tell Stonerock to refrain from working in the area un-

less the lines were deenergized (*id.* at A18).[1] Although the company had held annual safety meetings and had on occasion told its employees to stay at least ten feet away from electric power lines, the supervisor did not instruct Stonerock at the jobsite to stay a specified distance away from the lines terminating at the tower (*id.* at A6, A13-A14). And while the supervisor told Stonerock that there was a possibility protective equipment would be necessary, he neither instructed Stonerock to obtain such equipment nor told him it would be provided to him (*id.* at A13, A18-A19).

On these facts, the administrative law judge found that the employer had done all that was necessary to protect its employees and, under the "reasonable diligence" standard of 29 U.S.C. 666(j), could not have known of the violation. He therefore vacated the citation issued by the Secretary (Pet. App. A21-A27). The Occupational Safety and Health Review Commission reversed (*id.* at A10-A20), holding that neither the petitioner's general warning to Stonerock of the existence of the hazard nor its annual safety meetings fulfilled its obligation to take reasonable precautions to protect employees from foreseeable hazards.[2] Under the Commission's precedents, an employee working close to energized lines must receive explicit safety instructions and "more specific and appropriate safety instructions than those received at general safety meetings" (*id.* at A18). Based on

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[1] The supervisor told Stonerock's co-worker to "check with Jeffrey about the electricity" (Pet. App. A14); however, he did not tell this employee to relay the message to Stonerock, nor did he tell Stonerock himself (*ibid.*).

[2] The Commission reduced the penalty from $550 to $400, however, in light of petitioner's cooperation (Pet. App. A5).

the facts in this case, the Commission concluded that "Stonerock could well have believed that he had to paint close to the lines in order to perform his job," that the employer "failed to exercise reasonable diligence" to prevent his contact with the wires, and that the company "possessed the requisite constructive knowledge of the violation" (*id.* at A19).

The court of appeals affirmed, concluding that the Commission's finding that the company had committed a serious violation of the safety standard was supported by substantial evidence (Pet. App. A2-A9). The court acknowledged that reasonable minds could differ over the implications of the evidence (*id.* at A8), but held that the evidence was sufficient to support the Commission's finding that adequate safety instructions were not given and its conclusion that through the exercise of reasonable diligence petitioner could have anticipated that Stonerock might work in such proximity to the live electric power circuit that he risked coming into contact with it (*id.* at A8-A9).

ARGUMENT

Petitioner contends (Pet. 7-12) that the decision below conflicts with decisions in other circuits holding that the Occupational Safety and Health Act does not impose strict liability on employers for the unforeseeable and negligent actions of their employees. Contrary to petitioner's repeated assertions, however, the court of appeals did not impose a strict liability standard. Rather, it applied the "reasonable diligence" standard fixed by statute (see 29 U.S.C. 666 (j)), and simply upheld the Commission's fact finding that petitioner had not properly anticipated the

violation nor taken adequate safety precautions to prevent its occurrence (Pet. App. A8-A9).[3]

That legal standard was correctly applied to the facts of this case. The Act imposes an obligation on each employer "to assure compliance [with health and safety requirements] by his own employees." *Legislative History Of The Occupational Safety And Health Act Of 1970*, 92d Cong., 1st Sess. 150-151 (Comm. Print 1971). Annual safety meetings like those held by petitioner, during which many hazards are discussed in the abstract, are insufficient standing alone to fulfill this duty. An employer must also issue specific instructions at the worksite on safe procedures for handling particular jobs. See *Ames Crane & Rental Service, Inc.* v. *Dunlop*, 532 F.2d 123, 125 (8th Cir. 1976); *Getty Oil Co.* v. *OSHRC*, 530 F.2d 1143, 1146-1147 (5th Cir. 1976); *Brennan* v. *Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975). The fact that an employee is experienced (Pet. 8) does not relieve the employer of this requirement, because even experi-

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[3] In focusing on the foreseeability of the violation, the court below implicitly recognized that imposition of strict liability is precluded by Section 17 of the Act, 29 U.S.C. 666. Section 17(k) provides that where there is "a substantial probability that death or serious physical harm could result," violations will be deemed "serious" unless the cited employer "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. 666(j). The statute does not specifically excuse employers from "other than serious" violations on the same ground (see 29 U.S.C. 666(c)), but the Commission has read into it an equitable defense to such violations that mirrors the "lack of knowledge" defense of Section 17(k). See, *e.g.*, *Scheel Constr., Inc.*, 4 Occup. Safety & Health Cas. 1824 (1976).

enced employees sometimes neglect their safety responsibilities. See *Brennan* v. *OSHRC*, 491 F.2d 1340, 1341 (2d Cir. 1974). An employer is therefore responsible for an employee's carelessness unless it takes reasonable precautions to protect against the possibility of carelessness. See *Brennan* v. *Butler Lime & Cement Co.*, *supra*, 520 F.2d at 1017; *Nat'l Realty & Constr. Co.* v. *OSHRC*, 489 F.2d 1257, 1266-1267 n.37 (D.C. Cir. 1973).

In light of the life-threatening nature of the hazard involved here, the negligible effort that would have been required to tell Stonerock at the jobsite to stay ten feet away from the electric power lines until they were deenergized, and the opportunity available to the supervisor to so instruct him, the Commission had ample basis for concluding that petitioner did not in this instance conduct itself as a reasonably diligent employer. See *Getty Oil Co.* v. *OSHRC*, *supra*. Accord, *Usery* v. *Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977). Petitioner's challenge to the sufficiency of the evidence supporting this conclusion was properly rejected by the court of appeals, and further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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